TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 335

UNITED STATES OF AMERICA, WHICH SUES FOR THE USE AND BENEFIT OF CHARLES P. WILHELM, TRUSTEE, ETC., ET AL., PETITIONERS,

vs.

NELLIE FLYNN CHAIN, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES W. FLYNN, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 2, 1936.

CERTIORARI GRANTED OCTOBER 19, 1936.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF WEST VIRGINIA

In Debt. At Law. No. 580. Elkins

THE UNITED STATES OF AMERICA, Which Sues for the Use and Benefit of Charles P. Wilhelm, Trustee of the Estate of W. H. Pentony, Bankrupt, Plaintiff,

vs.

THE KINGWOOD NATIONAL BANK, GEORGE A. HERRING and Nellie Flynn Chain, Executrix of the Estate of James W. Flynn, Deceased, Defendants

Note by District Clerk:

DECLARATION—Filed July 30, 1932

The United States of America, to the use of Charles P. Wilhelm, trustee of the estate of W. H. Pentony, bankrupt, a citizen and resident of the State of West Virginia, by F. E. Parrack, its attorney, sues The Kingwood National [fol. 2] Bank, a corporation under the laws of the United States of America, Geo. A. Herring and Nellie Flynn Chain, Executrix of the last will and testament of James W. Flynn, deceased, the latter two of whom are citizens of the State of West Virginia; and the said plaintiff says that Charles P. Wilhelm, trustee of the estate of W. H. Pentony, bankrupt, was duly appointed by this Court as such trustee on the 24th day of July, 1930, and which appointment was duly confirmed, and he has acted as, and is now acting as, such trustee, under proper bond and qualification, as aforesaid, and the said W. H. Pentony was duly adjudicated a bankrupt by this Court on the 9th day of July 1930; and that the said plaintiff sues the said defendants for that, and complains of them of a plea of debt, that they render unto it, for the use of the said Charles P. Wilhelm, trustee, as aforesaid, the sum of $5,000.00, lawful money of the United States, which they owe to and from it unjustly detain, and which the said Executrix unjustly detains from it, and the defendants The Kingwood National Bank, a corporation and Geo. A. Herring, owe to and from it unjustly detain;

And the said plaintiff says that the said James W. Flynn, departed this life on the day of March, 1926, and that the said Nellie Flynn Chain, Executrix as aforesaid, and defendant herein, qualified as executrix of his last will and testament on the 8th day of May, 1926, in the County Court of Preston County, West Virginia, having been duly appointed as such by the said Court on said date, and has ever since acted as, and is now acting as, such Executrix, under the will of the said James W. Flynn, deceased, which was duly probated in such County Court according to law, on the 8th day of April, 1926.

And that the said plaintiff sues the said defendants for that the said The Kingwood National Bank, a corporation, by its president and officer James W. Flynn, duly qualified so to act, and the said Geo. A. Herring and the said James W. Flynn, in the lifetime of the latter, did, on the 26th day of July, 1924, in Preston County, West Virginia, by their writing obligatory, sealed with their seals, and now unto the Court here shown, and which writing obligatory is substantially as follows:

[fol. 3] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Bond of the Kingwood National Bank as Depository for Moneys of Bankrupt Estates

In the U. S. District Court, Northern District of West Va. Filed Jul. 30, 1934 *19*— At Elkins, West Va. I. Wade Coffman, Clerk.

Know All Men by These Presents: That We, The Kingwood National Bank, of Kingwood, W. Va., a banking corporation created and existing under and by virtue of the laws of the United States as Principal, and Geo. A. Herring and James W. Flynn both of Kingwood, Preston County, West Virginia, as Sureities, are held and firmly bound to the United States of America in the sum of Five Thousand Dollars lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assignees, jointly and severally, firmly by these presents.

In Witness Whereof, *the* The Kingwood National Bank has hereunto caused its name to be signed by its President

and its Corporate Seal to be affixed as and for its act and deed; and the said Geo. A. Herring and James W. Flynn, have hereunto signed their names and affixed their seals this 26th day of July, 1924.

The Condition of This Obligation is Such that whereas the said The Kingwood National Bank was on the 22nd day of July, 1924, designated by the Honorable W. E. Baker, Judge of the District Court of the United States for the Northern District of West Virginia, as depository for the funds arising in the matter of the estates of bankrupts, under the acts of Congress relating to Bankruptcy.

Now, Therefore, if the said The Kingwood National Bank shall well and faithfully discharge and perform all the duties pertaining to its as depository of the funds, arising in the estates of bankrupts, then this obligation [fol. 4] shall be void, otherwise to remain in full force and virtue.

The Kingwood National Bank, by James W. Flynn, President. (Seal.) Geo. A. Herring, (Seal.) James W. Flynn. (Seal.)

STATE OF WEST VIRGINIA,
County of Preston, to-wit:

On this 26th day of July, 1924, the above named James W. Flynn personally appeared before me and upon his oath says that he is the President of the above named bank, and that he signed the foregoing bond for and on behalf of the said Banking Corporation, and at the same time the above named Geo. A. Herring and James W. Flynn, appeared before me and severally acknowledged the execution of the foregoing bond.

Chas. H. Manown, Notary Public. My Commission expires on the 22nd day of April, 1929. (Seal.)

STATE OF WEST VIRGINIA,
County of Preston, to-wit:

Geo. A. Herring and James W. Flynn, the sureties on the foregoing bond, being duly sworn, deposes and says that he is a resident and a freeholder within Preston County and said District and is worth in property at its actual value $32,500.00 over all debts and liabilities which he owes

or has incurred and exclusive of property exempt by law from sale under execution.

Geo. A. Herring. James W. Flynn.

Subscribed and sworn to by and before me this 26th day of July, 1924. Chas H. Manown, Notary Public. My Commission expires on the 22nd day of April, 1929. (Seal.)

Approved July 30, 1924. W. E. Baker, U. S. District Judge.

[fol. 5] And which written obligatory is signed by the defendants, the said Kingwood National Bank, a corporation by its President, as aforesaid, and by Geo. A. Herring, and by James W. Flynn in the latter's lifetime, and whose Executix, as aforesaid, is sued herein, and the date whereof is the same day and year last aforesaid, and in which writing obligatory the defendants the Kingwood National Bank, a corporation, by its president as aforesaid, and the said Geo. A. Herring, and the said James W. Flynn, in the latter's lifetime, and whose exec*tu*rix is sued thereon herein as aforesaid, acknowledged themselves to be held and firmly bound unto the said United States of America, in the just and full sum of $5,000.00, which said sum is above demanded, to be paid to it, the United States of America, for the use of the said Charles P. Wilhelm, trustee of the estate of W. H. Pentony, bankrupt, as aforesaid. Yet the said Kingwood National Bank, a corporation, and the said Geo. A. Herring, and the said Nellie Flynn Chain, Executrix of the last will and testament of James W. Flynn, deceased, have not, nor has either of them as yet paid the said sum of $5,000.00, or any part thereof, to the said United States of America, though often requested so to do, but they have, and each of them has, hitherto wholly refused and neglected, and they do, and each of them still does, so neglect and refuse to pay the same to the said United States of America; nor did the said James W. Flynn pay the same in his lifetime, and his executrix still detains the said sum from the said United States of America, although requested to pay over the same and to not longer detain it from this plaintiff.

The said bond as shown above, was duly filed in this Court according to law, with the Clerk thereof, July 30th,

1924, and was duly approved by the Honorable W. E. Baker, Judge of the United States District Court for the Northern District of West Virginia, according to law, on the 30th day of July, 1924; and the said The Kingwood National Bank, a corporation, was thereupon duly approved, according to the statute law of the United States of America as a depository for the moneys belonging to the estates of bankrupts, by the said Court.

The said bond, as shown above, binds the heirs, executors, administrators, successors and assignees, jointly [fol. 6] and severally, of its several signers, as shown above, and the said James W. Flynn, in his lifetime, signed and sealed the same, on the date as shown, and this action is against his Executrix, Nellie Flynn Chain, as aforesaid, as well as the defendants The Kingwood National Bank, a corporation, and Geo. A. Herring.

The said trustee in bankruptcy, Charles P. Wilhelm, as trustee for the estate of W. H. Pentony, bankrupt, deposited in the said The Kingwood National Bank, a corporation, sums of money belonging to the said estate, as the same were received by him, starting such deposits on the 12 day of August, 1930, and all of which deposits were approved by this Court, by its Referee in bankruptcy before whom said bankruptcy matter of W. H. Pentony, bankrupt, is now pending; and under the order of this Court, by its Referee as aforesaid, withdrawals were made from said trustee account in said Kingwood National Bank from time to time; and new deposits were put in said account and approved as aforesaid by this Court, and said deposits and withdrawals were so made from said date of August 12th, 1930, in said account, in said bank, until the 22nd day of June, 1931.

On the 22nd day of June, 1931, the said The Kingwood National Bank, a banking association under the laws of the United States of America, closed its doors and ceased to do business any longer as a banking institution, and became insolvent; and refused to pay its depositors, and refused to pay the said trustee the balance which he had to his account on said date as such trustee of such bankrupt's estate in the said Bank, although often requested by said trustee so to do. The trustee had as his balance in said trustee's account in said Bank, on the said 22nd day of June, 1931, the sum of $3,190.72, which the said defend-

ants The Kingwood National Bank, a corporation, and the said Geo. A. Herring, owe to this plaintiff and unjustly retain from it, and which sum the said Nellie Flynn Chain, Executrix as aforesaid of the last will and testament of the said James W. Flynn, deceased, unjustly detains from this plaintiff; and on which sum the said plaintiff claims interest at six per cent per year from said 22nd day of June, 1931, until paid, and which interest also the said two first named defendants owe to this plaintiff and unjustly detained from it, and which the said defendant, Nellie Flynn [fol. 7] Chain, Executrix as aforesaid, unjustly detains from this plaintiff.

And the plaintiff further says that the said The Kingwood National Bank did not well and faithfully discharge and perform all the duties pertaining to it as depository of the funds, arising in the estates of bankrupts; but, on the contrary, did cease and close as a banking business on the 22nd day of June, 1931, as aforesaid, owing to the said plaintiff, for the use of the said trustee of the estate of W. H. Pentony, bankrupt, the sum of $3,190.72, with interest from said 22nd day of June, 1931, until paid, and still so owes the same, and refuses to pay same when demanded; wherefore, the plaintiff shows that the defendant herein, to-wit, The Kingwood National Bank, a corporation, and the sureties on said bond, Geo. A. Herring and James W. Flynn, the latter by his Executrix, as aforesaid, did not fulfill the condition of said depository bond, and, therefore are liable to the plaintiff herein for and on account of the same; and the conditions of which depository bond are shown above in this declaration, into which it is substantially copied.

And this plaintiff brings this action in this Court by reason of the statute laws of the United States for America which authorize the said The United States of America, when a plaintiff in an action at law, to maintain said action in this Court.

Yet the defendants, although often requested, have not, nor has either of them, paid to the plaintiff or to the said Charles P. Wilhelm, trustee of the estate of W. H. Pentony, bankrupt, the sum of money above demanded, or any part thereof, but so to do have hitherto wholly refused and still do refuse, to the damage of the plaintiff $5,000.00 and therefore this suit is brought.

F. E. Parrack, Attorney for the Plaintiff.

In United States District Court

Demurrer of Nellie Flynn Chain, Executrix—Filed August 3, 1932

Demurrer of the defendant, Nellie Flynn Chain, executrix, to the plaintiff's declaration.

This defendant Nellie Flynn Chain, executrix, demurs to the plaintiff's declaration and says that the same is not [fol. 8] sufficient in law to show any liability on estate of the surety James W. Flynn, nor on his executrix, heirs or devisees.

And for grounds of demurrer this demurrant assigns the following reasons:

The declaration sets forth and avers that the bond sued on with James W. Flynn, surety, was executed July 26, 1924, and was approved by the District Court of the United States for the Northern District of West Virginia, on the 30th day of July, 1924.

That said surety departed this life in the month of March, 1926, and that this defendant, Nellie Flynn Chain, was appointed and qualified as executrix of the last will and testament of said James W. Flynn in the month of May, 1926.

That the first deposit made by the plaintiff, Charles P. Wilhelm, as trustee of the estate of W. H. Pentony, bankrupt, in the Kingwood National Bank, principal on the bond, was made August 12, 1930, about four years and five months after the death of the surety James W. Flynn.

That certain other deposits and withdrawals of said bankrupt's estates funds were made between August 12, 1930, and June 21, 1931, when a balance of the said last mentioned date in the sum of $3,190.72 remained in said bank as funds belonging to the estate of the said bankrupt.

That on said date, June 21, 1931, the said bank closed its doors becoming and was insolvent, which said date, June 21, 1931, was about five years and three months after the death of the surety, James W. Flynn.

That the averments in said declaration show there were no funds of the estate of said bankrupt or of any other bankrupt on deposit in the defendant bank at the time of the death of said surety, James W. Flynn, and had been no such deposits for more than four years after the death of said surety.

That it is not averred in said declaration that this defendant as executrix had any knowledge nor was she notified that such funds were being or would be deposited in said bank after the death of said surety.

That the said declaration does not aver that this defendant had any knowledge or information that said funds were [fol. 9] so on deposit before the said bank closed its doors as aforesaid.

That it is not averred in said declaration that either before or after the death of said surety, James W. Flynn, his said executrix knew that he was surety on said bond or that such bond existed.

For the foregoing reasons and grounds and for other reasons and grounds appearing upon the face of said declaration this demurrant prays that her demurrer be sustained and that this action be dismissed as to her as to the estate of the said James W. Flynn.

Nellie Flynn Chain, Executrix, Defendant, by her Attorney P. J. Crogan.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL DEMURRER TO PLAINTIFF'S DECLARATION—Filed March 13, 1933.

The defendant, Nellie Flynn Chain, Executrix of the estate of James W. Flynn, deceased, now here adds this supplemental demurrer to the plaintiff's declaration in addition to the demurrer heretofore filed and says, that said declaration is not sufficient in law to show any liability on the estate of the surety, James W. Flynn, or his executrix, heirs or devisees.

And now, for further and additional ground of demurrer assigns the following reason:

Because the declaration does not allege that the trustee did not know the surety, James W. Flynn, was dead before the said deposits were made by said trustee in the defendant bank.

For the foregoing reason and ground and as well for the reasons and grounds heretofore filed in a former demurrer to the declaration this demurrer prays that her demurrer

be sustained and that this action be dismissed as to her and as to the estate of the said James W. Flynn.

Nellie Flynn Chain, Executrix, Defendant, by P. J. Crogan, Her Attorney.

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER FILING DEMURRER AND SUPPLEMENTAL DEMURRER—Filed March 13, 1933

This Thirteenth day of March, 1933, came the parties hereto by their counsel, and the defendant Nellie Flynn Chain, executrix, tendered and by leave of the Court filed her supplemental demurrer to the plaintiff's declaration herein.

Thereupon the demurrer (heretofore filed) and the said supplemental demurrer of said Nellie Flynn Chain, executrix, were argued by counsel and the said demurrer and supplemental demurrer submitted to the Court for its decision thereon.

By leave of the Court, counsel for said Nellie Flynn Chain and for said plaintiff filed their respective briefs upon the said demurrer and supplemental demurrer.

Enter.

W. E. Baker, Judge.

IN UNITED STATES DISTRICT COURT

JUDGMENT ORDER—Entered September 21, 1935

This 21st day of September, 1935, came again the parties by their attorneys, and said parties having heretofore waived trial by jury and submitted this case to the Court in lieu of a jury and having by leave of the Court filed an agreed statement of facts entitled "Stipulation by Parties", dated the 24th day of July, 1933, and neither party desiring to introduce any further evidence, now, upon presentation thereof, the Court is of opinion to and doth find for the plaintiff against the defendants and each of them, in the sum of Three Thousand Six Hundred and Eighty Dollars and Twenty-five Cents ($3,680.25).

It is therefore considered by the Court that the plaintiff Charles P. Wilhelm, Trustee of the estate of W. H. Pentony, do recover of and from the defendants The Kingwood National Bank, a corporation, George A. Herring, and Nellie Flynn Chain, Executrix of the will of James W. Flynn, [fol. 11] deceased, the sum of Three Thousand Six Hundred and Eighty Dollars and Twenty-five Cents ($3,680.25), with interest thereon from this date until paid, such recovery as to Nellie Flynn Chain, Executrix, to be from funds and property in her hands as such Executrix and not from her individual property; and that said plaintiff do also recover of and from said defendants his costs about the prosecution of his action in this case as allowed by statute, and all proper taxable costs herein; and to the judgment of the Court herein the defendants by their attorneys object and except.

Enter.

W. E. Baker, Judge.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions by Executrix—Filed October 24, 1935

Be it remembered that on the 24th day of July, 1933, at the hearing and trial of this case, counsel for the plaintiff and for the defendant having notice hereof and being present at said hearing, the said parties waived trial by jury and submitted the case to the court in lieu of a jury, and by leave of the court filed an agreed statement of facts entitled "Stipulation by Parties", dated the 24th day of July, 1933, which stipulation is in the words and figures following:

STIPULATION AS TO FACTS

"The parties to the above styled cause, United States of America and Charles P. Wilhelm, Trustee, by their attorney, F. E. Parrack; The Kingwood National Bank and George A. Herring by their attorney, James T. Dailey; and Nellie Flynn Chain, Executrix of the will of James W. Flynn, deceased, by P. J. Crogan, her attorney, hereby stipulate, with regard to the facts in said case, subject to the following conditions, viz:

The said United States of America and Charles P. Wilhelm, Trustee, by their attorney, and the Kingwood National Bank and George A. Herring by their attorney, believe that the facts stipulated, and each of them, are immaterial, and would not be by a Court permitted to be introduced in evidence over objection if the case were tried [fol. 12] by a jury; and said parties, not waiving, but insisting upon the immateriality of said facts, and that the Court should hold them to be immaterial, except as to the execution and approval of said bond as herein alleged, and not consider them in determining this controversy, admit and stipulate that if said facts, or any of them, are material, the following facts actually exist:

(a) That the bond in question was executed by the parties thereto, as alleged in the declaration in this case, and was in words, figures and characters as set forth in said declaration, and was executed and filed for the purpose of making said The Kingwood National Bank a depository for funds of bankrupt estates, and having said bank legally designated as such depositary, and that said bond was approved by this Court, and recorded in its records in all respect as in said declaration alleged; and that at the time said bond was executed by James W. Flynn, he and the defendant George A. Herring, were each directors of said Bank.

(b) That said Flynn and Herring each resided in the Town of Kingwood, Flynn so residing up to the time of his death, and Herring continuously so residing up to the present time.

(c) That upon the death of said Flynn, said Herring became the president of said Bank, and also remained a director thereof until the closing of the said bank in 1931.

(d) That the trustee, Charles P. Wilhelm, resided in the Town of Kingwood before and at the time of the death of said James W. Flynn, but was not personally acquainted with said Flynn, and had no knowledge of the death of said Flynn at the date of said death but had such knowledge about June, 1931, but was at that time attending a law school outside of Kingwood, and never had the death of said Flynn officially as trustee called to his attention in any way until the latter part of the year 1931. That had said Trustee been called upon to make investigation in re-

gard to the bond given by said The Kingwood National Bank, for the purpose of being made a depository for funds of bankrupt estates, said Trustee would have learned of the [fol. 13] death of said James W. Flynn. But at the time he deposited the funds now in question in said bank, said Charles P. Wilhelm, Trustee, was informed by the Referee in Bankruptcy to whom said cause was referred that the Kingwood National Bank was a duly qualified depositary for funds of bankrupt estates, and approved the deposit of said money in said bank by said Trustee; and at the time said deposit was made said Trustee had no knowledge of who signed the bond.

(e) That the defendant, Nellie Flynn Chain, executrix, had no knowledge of the existence of said bond until after said bank closed, when she was notified of its existence by the Receiver of said bank.

That Nellie Flynn Chain, the defendant, was employed as one of the book-keepers in said bank for a period of about three weeks in the year 1925, and likewise was employed for a week or ten days in May or June, 1926, after her father's death; that she never knew said Bank was a depositary for funds of bankrupt's estates.

That she never knew that her father, James W. Flynn, was an obligor of the bond in question, and never knew that there was such a bond until after the bank closed when she was notified by the Receiver of said Bank.

That she never was cashier or assistant cashier of said Bank, nor required to perform any of the duties of said offices.

That she also was employed in said Bank as bookkeeper during parts of the years 1918 and 1919.

(f) The parties hereby agree that this case be submitted to the Court, to be heard and determined by the court in lieu of a jury, the parties expressly hereby waiving a trial by jury, and agreeing that the case be so heard and determined by the Court upon the declaration, demurrer thereto, arguments or counsel, and upon this stipulation as to the facts, so far as the Court may hold said facts to be material.

(g) It being agreed that in passing upon said case the Court shall accept as true the allegations of said declara-

tion showing the fact that after the death of said James [fol. 14] W. Flynn said, The Kingwood National Bank, continued to act as a depositary for funds of bankrupt estates without giving any further or other bond than that relied upon in the declaration in this case, and that said Charles P. Wilhelm, Trustee, deposited as such Trustee the amount of money set forth in said declaration in said The Kingwood National Bank, on account of the bankrupt estate of W. H. Pentony, Bankrupt, and that there remained in said Bank to the credit of said Trustee, on account of said deposit, at the time said bank was placed in the hands of a Receiver, the amount of money shown by the declaration in this case; and that since this suit was instituted there has been paid to the said Trustee a dividend of (10%), amounting to $319.07, on the sixth day of January, 1933, and that no further or other sums have been paid to said Trustee by any one upon the amount claimed in said declaration".

And upon presentation of the case on said stipulation the Court on the 21st day of September, 1935, found for the plaintiff against the defendants, and each of them, in the sum of $3,680.25, and with interest from said 21st day of September, 1935, and the cost of this proceeding, to which action of the Court and order the defendant Nellie Flynn Chain, Executrix of the estate of James W. Flynn, deceased, excepted and tendered this her bill of exceptions, and asked that the same be granted and allowed, settled and signed.

P. J. Crogan, Counsel for the defendant Nellie Flynn Chain, Executrix.

ORDER SETTLING BILL OF EXCEPTIONS

Settled and allowed this 24th day of October, 1935.

W. E. Baker, Judge.

The undersigned attorneys of record in the above case hereby agree to the foregoing form of bill of exceptions.

F. E. Parrack, Counsel for C. P. Wilhelm, Trustee and The Kingwood National Bank. J. T. Dailey, Counsel for George A. Herring.

[fol. 15] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERROR—Filed November 27, 1935

Now comes Nellie Flynn Chain, Executrix of the last will and testament of James W. Flynn, deceased, in the above numbered and entitled case, and in connection with her petition for an appeal in this cause assigns the following error, which plaintiff avers occurred on the trial and hearing thereof, and upon which she relies to reverse the judgment entered herein, as appears of record.

This case having been tried by the court, a jury being waived by the parties, and heard by the court on written stipulations of fact made a part of the record, and the court erred in entering judgment against the defendant Nellie Flynn Chain, Executrix of the last will and testament of James W. Flynn, deceased, for the amount of said judgment, the action being upon a bond executed by the Kingwood National Bank with the said George A. Herring and James W. Flynn, since deceased, as sureties, the said bank being made a depositary for funds of bankrupt estates, and the plaintiff Charles P. Wilhelm, Trustee, made a deposit in said bank of the funds of the bankrupt estate, such deposit being made over four and one-half years after the death of said James W. Flynn, and without the knowledge of his personal representative, and unknown to her, until after the said bank became insolvent and was closed in 1931.

The judgment complained of being entered as aforesaid on the 21st day of September, 1935, and found for the plaintiff against the defendants, including this petitioner, in the sum of $3,680.25.

Wherefore plaintiff prays that the judgment of said court be reversed.

Nellie Flynn Chain, Executrix, by P. J. Crogan, Her Attorney.

[fol. 16] IN UNITED STATES DISTRICT COURT

APPELLANT'S NOTICE TO OTHER DEFENDANTS OF INTENTION TO APPEAL—Filed December 28, 1935

To the Kingwood National Bank, a corporation and George A. Herring, defendants in the above styled case:

You are hereby notified that it is the intention of this defendant, Nellie Flynn Chain, Executrix of the estate of James W. Flynn, deceased, to ask for an appeal in this case, and you are requested to join in said petition. Otherwise, if you refuse this defendant will ask for an appeal alone by filing a motion in court stating the facts and asking for the issuing of the writ in her behalf.

Nellie Flynn Chain, Executrix of the last will of James W. Flynn, Deceased, by P. J. Crogan, Her Attorney.

The Kingwood National Bank and George A. Herring refuse to join in said appeal.

J. H. Bane, Receiver for Kingwood National Bank.
George A. Herring, by J. T. Dailey, His Attorney.

IN UNITED STATES DISTRICT COURT

MEMORANDUM UNDER SECTION 7, RULE 14, C. C. A.

(1) Petition for appeal. Filed: November 27, 1935.
(2) Order allowing appeal. Entered and filed: November 27, 1935.
(3) Order extending time for citation. Entered and filed: January 6, 1936.
(4) Citation: Dated January 7, 1936.
Acceptance of service dated January 9, 1936.
Filed: January 11, 1936.
[fol. 17] (5) Bond: Dated November 21, 1935.
Approved January 4, 1936.
Penalty $500.00.
Obligors: Nellie Flynn Chain, Executrix, Felix Elliott.
Conditioned for damages and costs.

IN UNITED STATES DISTRICT COURT

STIPULATION TO PREPARE TRANSCRIPT OF RECORD AND PRINT SAME UNDER RULE 23 OF UNITED STATES CIRCUIT COURT OF APPEALS—Filed December 5, 1935

It is hereby stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above styled cause, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va.; and that it be printed under the supervision of the Clerk of that Court in accordance with Rule 23.

F. E. Parrack, Counsel for Charles P. Wilhelm, Trustee. P. J. Crogan, Counsel for Nellie Flynn Chain, Executrix.

November 30, 1935.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD—Filed December 5, 1935

The Clerk of said Court will please make up a transcript of this case and include in the same:

Declaration of Plaintiff.
Demurrer of Nellie Flynn Chain, Executrix.
Order of the Court on demurrer and joinder.
Order of the Court overruling demurrer and
Judgment on overruling the demurrer.
[fol. 18] Bill of exceptions by Executrix.
Petition for appeal by same.
Assignment of error by same.
Refusal of defendant Bank and Herring to join in petition.
Allowance of appeal.
Citation.
Bond.

Respectfully, P. J. Crogan, Counsel for Executrix.

The undersigned counsel for the plaintiff, Charles P. Wilhelm, Trustee, hereby agrees that the præcipe for the record asking for a transcript is satisfactory to said plain-

tiff, and counsel for plaintiff is willing that the matters set forth in said præcipe be included in the record and no additional papers need be included.

F. E. Parrack, Counsel for Charles P. Wilhelm, Trustee.

In United States District Court

Supplemental Præcipe for Record—Filed January 16, 1936

The clerk of said Court will please include in the transcript of the record of this case the supplemental demurrer of the defendant, the same being inadvertently omitted from the original præcipe.

Respectfully submitted, P. J. Crogan, Counsel for Executrix.

Agree to. F. E. Parrack, Counsel for Plaintiff.

[fols. 19 & 20] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 21] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4007

NELLIE FLYNN CHAIN, Executrix of the Last Will and Testament of James W. Flynn, Deceased, Appellant,

versus

CHARLES P. WILHELM, Trustee of the Estate of W. H. Pentony, Bankrupt, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Elkins

January 18, 1936, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, order extending time for issuance of citation, citation, and appeal bond are certified up under section 7 of Rule 14.

Same day, the appearance of P. J. Crogan is entered for the appellant.

February 4, 1936, twenty-five copies of the printed record are filed.

[fol. 22] February 11, 1936, the appearance of F. E. Parrack is entered for the appellee.

ARGUMENT OF CAUSE

April 6, 1936, (April term, 1936) cause came on to be heard before Parker, Northcott and Soper, Circuit Judges, and is taken on the brief on behalf of the appellant and argued by counsel on behalf of the appellee, and submitted.

[fol. 23] OPINION—Filed June 8, 1936

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

At Law. No. 4007

NELLIE FLYNN CHAIN, Executrix of the Last Will and Testament of James W. Flynn, Deceased, Appellant,

versus

CHARLES P. WILHELM, Trustee of the Estate of W. H. Pentony, Bankrupt, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Elkins

(Argued April 6, 1936. Decided June 8, 1936.)

Before Parker, Northcott and Soper, Circuit Judges

P. J. Crogan for Appellant, and F. E. Parrack for Appellee.

SOPER, Circuit Judge:

The crucial question to be determined in this case is whether the obligation of an individual surety upon a de-[fol. 24] pository bond given by a bank to secure the repayment of funds deposited by trustees in bankruptcy expires with the death of the surety. On July 30, 1924, the Kingwood National Bank of Kingwood, West Virginia, as principal, and George A. Herring and James W. Flynn, both of the same place, as sureties, executed a bond under seal in the sum of $5000. to the United States, for the payment of which they bound themselves, their heirs, executors, successors and assignees, jointly and severally. It was recited that the bank on July 22, 1924, had been designated as a depository of funds of estates in bankruptcy by the District Judge of the District Court of the United States for the Northern District of West Virginia; and the condition of the obligation was that if the bank should faithfully discharge and perform all the duties pertaining to it as such depository, then the obligation should be void; otherwise of full force and effect. The bond was approved by the District Judge and deposited with the clerk of the court.

Thereup n, under the provisions of the National Bankruptcy Act, 11 U. S. C. A. Ch. 101, 78 (h) the bank became an authorized depository of bankruptcy funds and the bond became subject to suit in the name of the United States for the use of any person injured by breach of its condition.

Flynn, the surety, whose liability under the bond is the subject of this discussion, was president of the bank. In March, 1926 he died, and thereupon Nelly Flynn Chain was appointed executrix of his estate. Herring, the other surety, was vice-president of the bank, and upon Flynn's death became the president. On August 12, 1930, more than four years after the death of Flynn, the trustee of the bankrupt estate of W. H. Pentony opened an account with the bank and made deposits therein until June 22, 1931, when the bank having become insolvent closed its doors. The trustee then had a balance to his credit of $3190.72, and to recover this sum with interest the present suit was [fol. 25] brought against the bank, Herring, the co-surety, and the executrix of the deceased surety. There is no evidence that any other bankruptcy funds were deposited in the bank either before or after the death of the surety.

The executrix raised the point in the District Court that Flynn's estate had no liability on the bond because he had died before the bankruptcy funds were deposited. The case was submitted to the court on an agreed statement of facts which, in addition to the facts already set out, showed that the executrix did not know of the existence of the bond until after the bank had closed; that the trustee before making the deposit was informed by the referee in bankruptcy that the bank was a duly qualified depository; that the trustee had no knowledge of the death of Flynn when he made the deposits, but would have learned of the death of Flynn if he had made any investigation in regard to the depository bond given by the bank; and that only 10 per cent of the funds deposited by the trustee had been repaid by the receiver of the insolvent institution. Upon these facts, the court found for the trustee in bankruptcy in the sum of $3680.25 with interest, and judgment for this amount was entered against the surety's estate; and the executrix, having excepted to the ruling of the court, entered this appeal.

The liability of the estate of the surety for a breach of the condition of the bond occurring after his death depends in the first place upon whether the bond was in itself a

binding contract from the date of execution or merely an offer which did not ripen into a contract until deposits were made; and then, if it is found that the bond was a complete contract in itself, it must also be determined whether it terminated or lapsed as to the deceased surety before the deposits were made. It has been suggested that there was no binding contract prior to death because the bond was merely an offer to insure the return to the depositors of funds deposited in the bank, and that until somebody accepted the offer by making a deposit, no binding contract [fol. 26] was formed; and since no deposits were made during the life of the surety, the contract as to him never went into effect. The situation is likened to a continuing guaranty of a series of performances in which the guarantor, without present consideration, guarantees a series of future sales or credits, such as a guarantee of the payment of the purchase price of goods to be sold, or the repayment of money to be loaned, from time to time, in the future. It has been generaly held that such a promise is in effect a series of continuing offers which do not ripen into contracts until each credit in the series is extended; that "the consideration is fragmentary, supplied from time to time and therefore divisible"; In re Crace, (1902) 1 Ch. 733, quoting Lloyd's vs. Harper, (1880) 16 Ch. D. 290; and while neither revocation nor death will affect the guarantor's liability for transactions previously entered into, either revocation or death will prevent further liability from accruing. Williston on Contracts, Sections 58, 1253.

On the other hand, when the consideration for the promise is indivisible and entire, and is given all at once at the outset, as in the case of the official bond of a guardian or administrator, clerk of court or county treasurer, the surety cannot revoke it, nor will his death relieve his estate from liability for subsequent defaults although the acts guaranteed may cover a long or indefinite period of time. Hecht vs. Weaver, 34 F. 111; Pond vs. United States, 111 F. 989; McClaskey vs. Barr, 79 F. 408; Fewlass vs. Keeshan, 88 F. 573; United States vs. Keiver, 56 F. 422; Williston on Contracts, Section 1253 and cases cited in Note 81.

In our opinion, the depository bond in the pending case is more nearly analogous to a guarantee of a series of sales or credits than to an official bond. It is true that upon the approval and filing of a depository bond in bankruptcy, the

bank acquires the status of an authorized depository, but until deposits are made, it is not an actual depository and [fol. 27] no liability for the repayment of funds can arise. Moreover, the period of responsibility is not only long continued, as sometimes is the case of an official bond, but conceivably it is without end and it is not reasonable to conclude that the surety enters into such a contract with the intention that he and his estate shall be forever bound as to future deposits without the possibility of revocation or withdrawal.

The effect of death upon a revocable offer is thus stated in the Restatement of Contracts, Section 48:

"A revocable offer is terminated by the offeror's death or such insanity as deprives him of legal capacity to enter into the proposed contract."

(See also Section 35). This rule has been criticized on the ground that under the modern view of the formation of contracts, it is not the actual meeting of the minds of the contracting parties that is the determining factor, but rather the apparent state of mind of the parties embodied in an expression of mutual consent; so that the acceptance by an offeree of an offer, which is apparently still open, should result in an enforceable contract notwithstanding the prior death of the offeror unknown to the offeree. On the other hand, it has been forcibly suggested that ordinarily the condition is implied in *on* offer that the offeror will survive to supervise the performance if his offer is accepted, and therefore an acceptance after death is ineffective even though the acceptor be ignorant of the offeror's death. See the discussion by Herman Oliphant in 18 Mich. Law Review, 201; James Lewis Parks, 19 id. 152, 23 id. 475, 29 Univ. of Mo. Bulletin (Law Series 40) 5; Merton L. Ferson in 10 Minn. Law Review, 373; Selected Readings on the Law of Contracts, pages 251, 260, 266, 275; Williston on Contracts, Revised Edition, Section 62. These conflicting views, however, were given consideration in the preparation of the Restatement, and the rule announced was adopted as representing the weight of authority and pro- [fol. 28] fessional opinion. See Proceedings of the American Law Institute, Vol. 3, Section 35, pages 196 to 202.

The same rule has been announced with reference to a revocable offer contemplating a series of contracts, such

as a continuing guaranty, if no seal is attached to the writing. Restatement, Section 44. In the cases in which the subject has been considered little or no account has been taken of the effect of a seal. In the greater number of the American cases, death alone has been held sufficient to terminate the offer, notice of death not being requisite. See United States vs. Robson, 9 Fed. Supp. 446; Jordan vs. Dobbins, 122 Mass. 168; Hyland vs. Habich, 150 Mass. 112; Aitken vs. Lang's Adm., 106 Ky. 652; In re Kelley, 173 Mich. 492; Michigan State vs. Leavenworth's Estate, 28 Vt. 209; L. Terpitz Thrown Silk Co. vs. Rich, 179 A. 305; American Chain Co. vs. Arrow Grip Mfg. Co., 235 N. Y. S. 228; Klatte vs. Franklin State Bank, 211 Wis. 613; see also Valentine vs. Donohoe, 133 Cal. 191; In re Lorch, 284 Pa. 500. In the following cases, notice of death has been stated to be necessary, although in some of them it was not necessary to decide the point; Gay vs. Ward, 67 Conn. 147; Natl. Eagle Banks vs. Hunt, 16 R. I. 148; Buckeye Cotton Oil vs. Amhrein, 168 La. 139; Exchange Bank vs. Hunt, 75 Wash. 513; Bradbury vs. Morgan (1862) 8 Jur. N. S. 918; In re Silvester, (1895) 1 Ch. 573; Coulthart vs. Clementson, (1879) L. R. 5 Q. B. D. 42; Harriss vs. Fawcett (1873) L. R. 8 Ch. 866; Dodd vs. Whelan (1897) 1 I. R. 575, (Ireland).

The depository bond in the pending case was under seal and although the effect of the seal was not discussed at the bar, we shall assume, as was concluded in a study of the legal status of the private seal in West Virginia in 40 W. Va. Quarterly, 330, that in regard to such an instrument, local legislaton has not altered the general rule of the common law that an offer under seal is a completed contract in itself irrespective of consideration. The rule as to the term- [fol. 29] ination of such a contract by revocation or death is not so broad or inflexible as that set out in Sections 35 and 48 of the Restatement with reference to revocable offers generally. Section 46 of the Restatement is as follows:

"Sec. 46. Offers Which are Themselves Contracts.—An offer for which such consideration has been given or received as is necessary to make a promise binding, or which is in such form as to make a promise in the offer binding irrespective of consideration, cannot be terminated during the time fixed in the offer itself or, if no time is fixed, within

a reasonable time, either by revocation or by the offeror's death or insanity."

And Section 40 of the Restatement with respect to what lapse of time terminates an offer, provides:

"(1) The power to create a contract by acceptance of an offer terminates at the time specified in the offer, or if no time is specified, at the end of a reasonable time.

(2) What is a reasonable time is a question of fact, depending on the nature of the contract proposed, the usages of business and other circumstances of the case which the offeree at the time of his acceptance either knows or has reason to know."

In harmony with this statement of the law, it has been held that a statutory bond under seal, unlimited as to time, to secure the transmission to foreign countries of monies paid to steamship agents, is revocable upon reasonable notice to the official with whom the bond was required to be filed. Vidi vs. United Surety Co., 140 N. Y. S. 612; and the liability of sureties on a sealed instrument, unlimited as to time, to secure the payment for goods sold and delivered or the faithful performance of duty by an insurance agent or collector, may be terminated by notice reasonable in point of time under all the circumstances. Jeudevine vs. [fol. 30] Rose, 36 Mich. 54; Emery vs. Baltz, 94 N. Y. 408; Ricketson vs. Lizotte, 90 Vt. 386; Bremer vs. Rufener, 186 Wis. 195.

The depository bond in the present case was unlimited as to time. In our opinion the question, whether it was still effective and binding upon the estate of the deceased surety in 1930 when the first deposit was made, depends upon whether more than a reasonable time had elapsed since the execution of the contract; and in determining what was a reasonable time, we must consider all the circumstances of the case, including all those which the depositor knew or had reason to know when the deposit was made. When this is done, we are compelled to conclude that more than a reasonable time had passed in view of the circumstances surrounding the giving of the bond, the making of the first deposit, and the intervening death of the surety. When he died, the bond had been in existence for two years, and so far as we know, no trustee in bankruptcy

had ever made a deposit in the bank under the protection of the surety's promise. Indeed, not until four years after the surety's death did the trustee of the Petony Estate make a deposit and attempt to bring himself within the terms of the bond. At that time, as required by 11 U. S. C. A. 78 (f), the bond was on file in the office of the clerk of the court, and the trustee was charged with notice of its contents and was not relieved therefrom by the informal statement of the referee that the bank was an authorized depository of bankruptcy funds. The agreed statement shows that if at the time of the deposit the trustee had made an investigation in regard to the bond, he would have learned the true situation, and he would not have been able reasonably to conclude that the bond was still in effect. Such, we think, would necessarily have been the normal reaction of any reasonable man; and so it is clear that the bond had already terminated when the first deposit was made, and there was no factual basis for the verdict of the trial court.

It was said in Continental Casualty Co. vs. United States, [fol. 31] 68 F. (2d) 577, 580, with regard to a bond to secure deposits of bankruptcy funds, that there is no serious dispute of the right of a surety to terminate its suretyship where the term of the obligation is unlimited and the thing secured to be done is the compliance with specified contractual undertakings of the principal; but that to effect such a termination, proper proceedings should be taken. In our view, a surety on a depository bond in bankruptcy who desires to be relieved of the obligation under the bond, should give notice of withdrawal by petition to the court, and should secure an order of court revoking its appointment. It does not follow, however, that the liability of an individual surety upon such a bond must continue after his death until such a petition has been filed and order of court has been obtained. It is the duty of courts of bankruptcy under 11 U. S. C. A. 101, not only to designate bankruptcy institutions as depositories and to require depository bonds, but from time to time, as occasion may require, to increase the amount of any bond or change the depositories. Hence it is incumbent upon the court to keep itself informed as to the condition of such bonds and the responsibility of the sureties thereon, and it is not too much to expect the court to ascertain whether individual sureties are

living or dead, and to cancel the bond of a deceased surety within a reasonable time after his death.

The judgment of the District Court is Reversed.

PARKER, Circuit Judge, Dissenting:

In my view of this case, the bond sued on is in no sense a mere offer, revocable by the death of the offeror. It is a solemn contract, which was entered into pursuant to law in order that a bank might be designated by order of court as official depository of bankruptcy funds. 11 U. S. C. A. [fol. 32] 101. As a result of the giving of the bond, the bank was created an official depository and was eligible to receive deposits of bankruptcy funds as such. I cannot conceive that liability under the bond terminated, while this official status of the bank continued, merely because of the death of the bondsman. The bond is but a promise under seal and upon a sufficient consideration to pay to the United States the amount therein stipulated. It is well settled that a promise to pay money survives the death of the promisor; and I know of no principle upon which the promisor may be absolved merely because the promise is upon a condition and the breach of the condition occurs after his death. Death terminates the power of a deceased to act and revokes any authority or license he may have given; but his estate is liable upon a binding contract existing at the time of hs death, even though the liability may depend upon future contingencies.

I can see no difference in principle between such a case and that presented by any other bond required for the creation of an official status such as that of collector, guardian, administrator, sheriff or clerk of the court. In the case of such bonds, the rule is perfectly well settled that the estate of a deceased surety is liable for breaches and defalcations occurring after his death. 21 R. C. L. 982; 24 C. J. 290. Thus, such liability has been enforced upon the bond of a Collector of Internal Revenue: Pond v. U. S. (C. C. A. 9th) 111 Fed. 989, 997; upon the bond of an administrator: Hecht v. Skaggs, 53 Ark. 291, 22 Am. St. Rep. 192; upon the bond of a deputy sheriff: Green v. Young, 8 Greenleaf 14, 22 Am. Dec. 218; upon the bond of a clerk of the court: Snyder v. State, 5 Wyo. 318, 63 Am. St. Rep. 60; upon the bond of a guardian: Moore v. Wallis, 18 Ala. 458; upon the bond of a cashier of a bank: Shackamaxon Bank

v. Yard, 150 Pa. St. 351, 30 Am. St. Rep. 807, 810; and upon the bond of an agent for an insurance company: Royal Ins. Co. v. Davis, 40 Ia. 469, 20 Am. Rep. 581. The reason for [fol. 33] the rule was well stated more than a hundred years ago by Judge Weston, speaking for the Supreme Judicial Court of Massachusetts, in Green v. Young, supra, where the deputy sheriff's bond, like the bond before us, did not run for a fixed period. Said he:

"The intestate undertook that the principal in the bond should discharge the duties of the office to which he was appointed. For what period? So long as he continued in office under that appointment. The breach found, then, is within the very letter of the condition. The counsel for the defendant sets up, as a limitation of the liability of the intestate, that it is confined to breaches accruing in his life-time. This limitation is not to be found in the instrument; and if it is sustained, it must arise by construction of law from the nature of the undertaking. We have examined with care the cases cited for the defendant, but can find nothing to justify the limitation for which he contends. The plaintiff had a right to repose upon the solvency and sufficiency of the surety. If his security in regard to future breaches ceases upon the death of the surety, he might suffer, however vigilant. He might incur severe responsibilities, arising from subsequent breaches, before he could be advised of the death of the surety. If the defendant, representing the intestate, is not liable in this case, the death of a surety upon a sheriff's bond, and upon the bonds of the treasurer of the state, of a county, or town, of cashiers of banks, and of many other officers who are required to give bonds, would exonerate his estate from subsequent breaches, and throw the whole responsibility upon surviving sureties."

It is suggested that the bond here is distinguishable from official bonds because it does not run for a fixed period. Neither, for that matter, did the bonds in a number of the cases cited; but I think that this is a distinction without a difference. The condition of the bond is that the bank shall well and faithfully discharge and perform all duties pertaining to it as depository of funds. For what period? So long as the bank shall continue as a depository or until [fol. 34] liability shall be terminated upon substitution of

another bond under order of court. Id certum est quod certum reddi potest. The idea that, because the period of liability is not limited in the bond, the bondsman may terminate liability at any time he sees fit, does not appeal to me as sound. He has made it possible for the bank to be appointed a depository by going on its bond. An order of court has solemnly approved the bond and designated the bank as depository. And I do not think that he can be relieved of the obligation thus solemnly assumed, except by an act of court of equal solemnity, i. e. by an order terminating the status of the bank or approving another bond. As said by the Circuit Court of Appeals of the Seventh Circuit in Continental Casualty Co. v. U. S. 68 Fed. (2d) 577, 582, "Such suretyship is not to be lightly entered into, and when undertaken is not to be lightly terminated." In that case it was held that the surety could not terminate his liability under the bond merely by giving notice to the judge and to the bank.

But whatever be the right of the bondsmen to terminate liability by notice, which would lead to the requirement of another bond if the official status of the bank is to be continued, I do not see how such liability may be terminated merely by death without notice, which permits the continuance of the official status that the bond was given to safeguard. The liability under the bond was assumed that the official status of the bank might be created; and it seems unreasonable to me to give a construction to the bond which makes it possible for the liability thereunder to be terminated, without action by the court, while the official status of the bank, which was dependent upon that liability, is continued.

[fol. 35] JUDGMENT—Filed and Entered June 9, 1936

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4007

NELLIE FLYNN CHAIN, Executrix of the Last Will and Testament of James W. Flynn, Deceased, Appellant,

vs.

CHARLES P. WILHELM, Trustee of the Estate of W. H. Pentony, Bankrupt, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of West Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Northern District of West Virginia, at Elkins, with [fol. 36] directions to set aside the verdict and grant a new trial in accordance with the opinion of the Court filed herein.

Morris A. Soper, U. S. Circuit Judge.

June 9, 1936.

On another day, to-wit, July 10, 1936, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States at Elkins, West Virginia, in due form.

Same day, the original petition for appeal, order allowing appeal, and bond are returned to the Clerk of the District Court of the United States at Elkins, West Virginia.

[fol. 37] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereunto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 17th day of August, A. D., 1936.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit, by R. M. F. Williams, Jr., Deputy Clerk. (Seal United States Circuit Court of Appeals, Fourth Circuit.)

[fol. 38] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter F. E. Parrack. File No. 40,875. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 335. United States of America, which sues for the use and benefit of Charles P. Wilhelm, Trustee etc., et al., petitioners, vs. Nellie Flynn Chain, Executrix of the last will and testament of James W. Flynn, deceased. Petition for writ of certiorari and exhibit thereto. Filed September 2, 1936. Term No. 335, O. T., 1936.

FILE COPY

FILED
SEP 2 1936
CHARLES ELMORE CROP
CLER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 335

UNITED STATES OF AMERICA, WHICH SUES FOR THE USE AND BENEFIT OF CHARLES P. WILHELM, TRUSTEE OF THE ESTATE OF W. H. PENTONY, BANKRUPT, AND CHARLES P. WILHELM, TRUSTEE OF THE ESTATE OF W. H. PENTONY, BANKRUPT,

Petitioners,

vs.

NELLIE FLYNN CHAIN, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES W. FLYNN, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

F. E. PARRACK,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 335

UNITED STATES OF AMERICA, WHICH SUES FOR THE USE AND BENEFIT OF CHARLES P. WILHELM, TRUSTEE OF THE ESTATE OF W. H. PENTONY, BANKRUPT, AND CHARLES P. WILHELM, TRUSTEE OF THE ESTATE OF W. H. PENTONY, BANKRUPT,

Petitioners,

vs.

NELLIE FLYNN CHAIN, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES W. FLYNN, DECEASED.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the United States of America, which sues for the use and benefit of Charles P. Wilhelm, trustee of the estate of W. H. Pentony, Bankrupt, and of Charles P. Wilhelm, trustee of the estate of W. H. Pentony, Bankrupt, in Bankruptcy, respectfully shows to this Honorable Court:

Statement of Matter Involved.

The United States Circuit Court of Appeals for the Fourth Circuit rendered an opinion and made an order, judgment and decree on June 8, 1936, reversing a judgment rendered by the District Court of the United States for the Northern District of West Virginia, on September 21, 1935, in an action at law then pending in said District Court, being an action of debt on bond, which judgment was in favor of the petitioners, and jointly and severally against George A. Herring, the Kingwood National Bank, a Corporation, and the respondent, Nellie Flynn Chain, executrix of the will of James W. Flynn, deceased, for the sum of $3,680.25. The respondent alone prosecuted an appeal from said judgment to said Circuit Court of Appeals; from the judgment and order of said Circuit Court of Appeals the Senior Circuit Judge dissented.

The action in which said judgment was rendered was based on a bond payable to the United States of America, in the penalty of five thousand (5,000) dollars, dated July 26, 1924, signed by The Kingwood National Bank, a national banking association then engaged in business at Kingwood, in said Northern District of West Virginia, as principal, and by James W. Flynn and Geo. A. Herring, as sureties. James W. Flynn was then president of said banking institution. The bond recited, and which was a proper recital of the facts, that on July 22, 1924, W. E. Baker, Judge of said District Court, had designated said The Kingwood National Bank as a depository of funds arising from the matter of estates of bankrupts, and fixed the penalty of the required bond at five thousand (5,000) dollars.

Condition of Bond.

The condition of the bond was as follows:

> "Whereas, the said The Kingwood National Bank was on the 22nd day of July, 1924, designated by the Honorable W. E. Baker, Judge of the District Court of the United States for the Northern District of West Virginia, as depository for the funds arising in the matter of the estates of bankrupts, under the acts of Congress relating to Bankruptcy.
>
> "Now, Therefore, if the said The Kingwood National Bank shall well and faithfully discharge and perform all the duties pertaining to it as depository of the funds arising in the estates of bankrupts, then this obligation shall be void, otherwise to remain in full force and virtue."

Statute Authorizing Designation.

Said bank was designated as a depository as aforesaid under Section 101 of Title 11 of the United States Code of Laws, which reads as follows:

> Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

The bond in question was filed and approved July 30, 1924, and said bank, without giving further or other bond at any time, continued to act as a depository for such funds of bankrupt estates until June 22, 1931, when it became insolvent, closed its doors and a receiver for it was ap-

pointed by the Comptroller of the Currency of the United States (R. 6-12).

Petitioner Charles P. Wilhelm was, on July 9, 1930, appointed and qualified as trustee of the estate in bankruptcy of W. H. Pentony, a bankrupt, whose estate was then in course of administration by said District Court, and said petitioner, by direction of said court through its Referee in Bankruptcy, deposited funds of said bankrupt estate in said depository from time to time, and when said debtor closed its doors had on deposit of such funds $3,190.72 (R. 6).

Said bank, through its receiver, refused payment of this amount, and by direction of the referee the action above mentioned was instituted in said District Court.

James W. Flynn died, testate, in March, 1926. His will was probated, and respondent qualified as executrix thereof May 8, 1926, and is still acting in that capacity.

Respondent demurred to the declaration, and said demurrer appears on pages seven to nine inclusive of the record. But without awaiting action of the court on said demurrer, respondent, petitioner and all other parties in interest made a written, signed stipulation agreeing that if pertinent certain matters to the pertinency of which he objected were true, but not waiving objection to the pertinency of said matters. Said stipulation appears on pages eleven to fourteen of the record.

Questions Presented.

The controlling question is whether the death of the surety James W. Flynn, without notice thereof to the District Court or any of its officers, and without action of any kind being taken by his executrix, relieved his estate from further liability because of his suretyship on the aforesaid bond.

Incidental to the determination of the question are:

(a) What is the result of the designation of a bank as a depository of funds of bankrupt estates, and the execution and approval of the required bond? Does that immediately give the bank the status of a depository, or does it become a depository only when funds are deposited therein?

(b) What is the consideration for the execution of the bond? Is it the depositing of money in the bank, or is it the status which the bank acquires whereby it is placed and kept qualified at all times to receive such funds when tendered?

(c) Is the giving of the bond a mere revocable offer by the bank to be a depository, and does it acquire the status of a depository each time a deposit is made and lose such status if and when all deposits are withdrawn, and again become a depository when another deposit is made?

(d) Is it violative of public policy that the securities offered by the bond to creditors of bankrupts should be lost by the death of the sureties without further action or notice?

(e) Is it the duty of a District Court to keep himself constantly informed whether such sureties are still in life? And if it is his duty to do so, does a failure to perform that duty affect the liability of the estate of a decedent surety and destroy the security given by the bond for bankrupt funds?

(f) Was the bond in question a binding co ract from the date of its execution, or merely an offer not ripening into a contract until deposits were made?

(g) Was the consideration for the bond the establishment of the bank in a certain status, namely, a depository,

or was said consideration fragmentary, being supplied from time to time by deposits in the bank?

Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals of the Fourth Circuit has in this case decided a Federal question of substance not heretofore decided by this Court. This Court has not decided in any case whether the death of a surety on the bond executed by a bank for the purpose of qualifying as a depository of funds arising in the matter of the estate of bankrupts after said bank has been designated as such depository by the District Court of the United States relieves the estate of such surety from liability for funds deposited in such depository after a surety's death.

2. The judgment and order in this case as made and rendered by said United States Circuit Court of Appeals is in substantial conflict with the opinion and decision of the United States Circuit Court of Appeals for the Seventh Circuit as to the release of sureties on such bond as was the subject of suit in this case, in

Continental Casualty Company v. *United States*, 68 F. (2d), 577.

3. Said United States Circuit Court of Appeals for the Fourth Circuit has in this case decided a question of general importance, namely, the effect of the death of a surety on such bond as is above mentioned upon the surety's liability for future deposits in the depository. That question has not been, but should be settled by this Court.

4. The above mentioned question is a question of general law affecting the security of funds of bankrupt estates throughout the entire United States, and was decided by said Circuit Court of Appeals in a way untenable and in conflict with the weight of authorities.

WHEREFORE your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case, numbered and entitled on its docket Number 4007, at law, styled Nellie Flynn Chain, executrix of the last will and testament of James W. Flynn, deceased, appellant, *vs.* Charles P. Wilhelm, trustee of the estate of W. H. Pentony, bankrupt, appellee; that said judgment and order of said United States Circuit Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just, and your petitioners will ever pray.

UNITED STATES OF AMERICA AND
CHARLES P. WILHELM,
Trustee of the Estate of
W. H. Pentony, Bankrupt,
Petitioners.

By F. E. PARRACK,
Their Attorney.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The District Court of the United States for the Northern District of West Virginia in entering the judgment appealed from by respondent, did not render an opinion. The judgment order appears in the printed transcript of the record certified from the Circuit Court of Appeals on pages ten and eleven.

The opinion of the Circuit Court of Appeals upon a review of said case on appeal appears in full from the printed copy of said opinion certified to this Court by said Circuit Court of Appeals. This Court is respectfully referred to said records.

Jurisdiction.

(1) The Circuit Court of Appeals has decided a Federal question of great importance which has not, so far as we have been able to ascertain, been decided by this Honorable Court, namely, that the death of a surety on the bond of a depository of funds of bankrupt estates terminates liability of his estate for future deposits in such depository without any notice or other action by the personal representative to be relieved from such liability.

(2) The United States Circuit Court of Appeals for the Fourth Circuit has decided that a surety on such depository bond may be released by the mere fact of his death, and that it is the duty of the Judge of the District Court of the United States to keep himself constantly informed as to the continued life of such surety, and in this respect the decision is in substantial conflict with the decision of the

United States Circuit Court of Appeals of the Seventh Circuit in

Continental Casualty Company v. *United States*, 68 F. (2d) 577, Points 12, 13 and 14 of Syllabus.

(3) The said Circuit Court of Appeals has decided that a national bank executing the required bond after being properly designated as a depository of funds arising in the matter of bankrupt estates does not become a depository upon the approval of such bond, but only becomes a depository when funds of bankrupt estates are on deposit with it. This is an important federal question, involving the proper construction of Title 11, Section 101, U. S. C. A., which has not been, but should be determined by this Court.

(4) The conclusion of said Circuit Court of Appeals in the majority opinion that the failure of the District Judge to discharge what it conceives to be his duty in keeping himself informed as to the continued life of a surety can prejudice the right of the United States as the obligee of the bond in question does not give proper effect to the applicable decision of this Court in

Minturn v. *United States*, 106 U. S. 437, Pt. 3 Syl., and *Smith* v. *United States*, 8 L. Ed. 130.

Statement.

In the District Court of the United States for the Northern District of West Virginia, this case was submitted to the court in lieu of a jury upon the pleadings and stipulations of facts. That stipulation appears at length in the bill of exceptions in the printed record, pages eleven and fourteen, inclusive. From that statement it appears that after The Kingwood National Bank, of Kingwood, West Virginia, had been designated as a depository of funds of

bankrupt estates, it as principal executed a bond as required by its designation with George A. Herring and James W. Flynn as its sureties, which bond appears at length in said printed record, pages three and four; that at the date of said bond, July 26, 1924, James W. Flynn was the president and George A. Herring the vice president of said bank; that said bank, without giving further bond, continued to act as such depository until the twenty-second day of June, 1931; that James W. Flynn died, testate, in March, 1926, and respondent qualified and is still acting as executrix of his will; that petitioner, Charles P. Wilhelm, qualified on July 24, 1930, as trustee for W. H. Pentony, a bankrupt, whose estate was being administered by the District Court of the United States for the Northern District of West Virginia; that thereafter, from time to time, by direction of the Referee in Bankruptcy, said trustee deposited funds in said depository, and on June 22, 1931, said bank closed its doors, being insolvent, and a receiver therefor was appointed by the Comptroller of the Currency of the United States, said petitioner Charles P. Wilhelm, trustee, then having funds of said bankrupt estate in the sum of $3,190.72 on deposit in said bank.

Said receiver refused to pay, and at the instance of the Referee said suit was instituted on said bond; certain facts were stipulated to be true if material, but the materiality thereof was not waived, but was submitted along with other matters to said District Court, one being that said respondent did not know at any time prior to the closing of said bank that her testator was surety on the depository bond.

That after the death of Flynn, Herring became the president of the bank, and continued as such until it closed; that the trustee resided in Kingwood, but had no knowledge of Flynn's death until June, 1931; that had he made a personal investigation as to the depository bond given by said

bank he would have learned of Flynn's death, that he had no knowledge of the sureties on said bond, but was informed by the Referee that said bank was a duly qualified depository, and said Referee approved the deposit of the funds therein.

The District Court, upon the stipulation aforesaid of the facts, entered judgment in favor of the petitioner, Wilhelm, trustee, for $3,680.25, with interest and costs against respondent, said The Kingwood National Bank and George A. Herring. Respondent alone prosecuted the appeal to the Circuit Court of Appeals, which court rendered the judgment, the opinion complained of, the senior circuit judge dissenting.

The Statute.

Said The Kingwood National Bank was designated as a depository for such bankrupt funds under the provisions of Section 101, Title Eleven, U. S. C. A., which reads as follows:

> "Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories."

Specification of Errors.

The United States Circuit Court of Appeals for the Fourth Circuit erred:

(1) In holding that the depository bond in this case is analogous to a guaranty of a series of sales or credits,

rather than to an official bond, and in holding that the bank is not an actual depository until funds are deposited therein.

(2) In holding that the execution of the bond in question was a mere offer upon the part of the principal and surety to contract with such officers of bankrupt courts as might thereafter deposit funds in said bank.

(3) In holding that the trustee was charged with notice of the contents of the bond given by said bank as such depository, and was not justified in relying upon the information given him by the Referee that said bank was an authorized depository.

(4) In holding that it was the duty of the District Court to be continually informed as to whether sureties on depository bonds are living or dead.

(5) In holding that the death of Flynn relieved his estate from liability on said bond, and in reversing the judgment of the District Court in this case.

Argument.

I.

This case presents an important question not previously decided by this Court. It is a question of great importance. If the holding of the Circuit Court of Appeals in this case is sustained, then creditors of individuals, firms or corporations adjudged bankrupts may have the strong arm of the Government take from them the right to proceed in the usual manner for the collection of their demands against their debtor, only to find that the Government has failed to conserve and administer the assets of such debtor for their benefit. We believe that sound public policy demands that sureties and their estates upon such bonds should be held to most strict accountability, and not lightly released from liability thereon. The precise question here presented

has never been decided, so far as we can ascertain, by any Circuit Court of Appeals except in this case. The question of the discharge of a surety from such bond by his death was presented in

> *United States ex rel. Townshend, Trustee, et al.*, v. *Robson et al.*, 28 American Bankruptcy Reports, 45,

by Judge Northcott, sitting as District Judge in the Southern District of West Virginia; but in that case there was a very potent factor justifying the conclusion that the surety was released, which factor does not exist in this case. In that case, after the death of the surety his estate had been completely administered under the laws of the State of West Virginia, and the administration thereof duly closed. The Statute of West Virginia relating to the effect of the completion of the administration act reads as follows:

> "Every person having a claim against a deceased person, whether due or not, who shall not, when notice to creditors has been published as described in this Article, have presented his claim on or before the time fixed in such notice, or before that time have instituted action or suit thereon, shall, notwithstanding the same be not barred by some other statute of limitations that is applicable thereto, be barred from recovering such claim of or from the personal representative, or from thereafter setting off the same against the personal representative in any action or suit whatever."
>
> Part of Chapter 44, Article 2, Section 26, West Virginia Code.

II.

The majority opinion contains this statement relative to James W. Flynn:

> "When he died, the bond had been in existence for two years, and so far as we know, no trustee in bank-

ruptcy had ever made his deposit in the bank under the protection of the sureties' promise."

It is a violent assumption that said bank had been a qualified depository for funds of bankrupt estates for about seven years and that no funds of such estates had ever been deposited therein. Such assumption is not warranted by anything in the record. The stipulation of facts did not concern itself with deposits made by other trustees, and had the matter been submitted to a jury no trial court would have permitted evidence to be given to the jury as to such deposits.

III.

The majority opinion of the said Circuit Court of Appeals makes an untenable distinction between what it terms a depository for funds of bankrupt estates and an actual depository. Section 101, Title 11 of the Bankruptcy Act certainly was not designed to create a mythical or unsubstantial status of a bank designated as a depository under the terms thereof and executing the required bond.

Lloyds v. *Harper*, 16 Eng. Chancery Division, 290, holds that where a guaranty is given for a consideration once for all it can not be terminated by the death of the guarantor, even upon notice.

For what was the bond given? In this case the bond was given not to secure funds deposited by any particular trustee or receiver, nor can it be analogous to a bond given for private purposes. The consideration for this bond was that the bank should have the status of a depository, not that it should receive any particular deposits of money, but that it should have the right to receive such deposits. The consideration for it was given once for all.

IV.

It was not the duty of the District Judge to devote himself to constant surveillance over various depositors' bonds and the sureties thereon. It was the duty of any surety trying to be released or desiring to be released to take active steps to that end. In

Continental Casualty Company v. *United States, supra,*

the surety notified the District Judge that it had canceled its suretyship on said bond. The Circuit Court of Appeals for the Seventh Circuit held that it was entitled to terminate its liability on the bond, with which conclusion we do not concur. But it further held that such surety must notify the District Court and receivers and trustees as well before it could terminate its liability.

This Court indicated, in *Smith* v. *United States, supra,* that there was no absolute right in the surety on a bond taken in compliance with law to withdraw from his suretyship, but expressed the opinion that no court would refuse to grant release if it were requested.

In this particular case the District Court had ample authority to require the depository to furnish a new bond or cease to be a depository.

U. S. C. A., Title 11, Section 101.

There can be no doubt that had the respondent applied for release from liability on the bond such action would have been taken. That she did not know of the suretyship can not affect the situation. In not informing herself as to the situation, she is no worse off than if without her knowledge her testator had been surety upon an administrator's bond, in which case his liability could not be questioned.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 335

UNITED STATES OF AMERICA, WHICH SUES FOR THE USE AND BENEFIT OF CHARLES P. WILHELM, TRUSTEE, ETC., ET AL.,

Petitioners,

vs.

NELLIE FLYNN CHAIN, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES W. FLYNN, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONERS.

F. E. PARRACK,
Counsel for Petitioners.

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UNITED STATES OF AMERICA, WHICH SUES FOR THE USE AND BENEFIT OF CHARLES P. WILHELM, TRUSTEE, ETC., ET AL.,

Petitioners,

vs.

NELLIE FLYNN CHAIN, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES W. FLYNN, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONERS.

Statement of the Case.

To this action of Debt on Bond by petitioner, in the District Court of the United States for the Northern District of West Virginia, the Kingwood National Bank, George A. Herring and respondent were defendants.

The declaration averred:

1. On July 22, 1924, said bank was, by said District Court, designated a depository for funds arising in the matter of

estates in bankruptcy and a bond required in the penalty of five thousand dollars (R. 1).

2. On July 24, 1924, the bank by James W. Flynn, its president, executed the bond in suit with said Flynn and George A. Herring as sureties (R. 2 & 3). It was approved July 30, 1924 (R. 4).

3. The bank was a depository until June 22, 1931, when it closed its doors (R. 4).

4. James W. Flynn died in March, 1931, testate and respondent qualified as executrix of his will and was acting as such at the date of suit (R. 2).

5. Petitioner, by virtue of appointment and qualification on July 24, 1930, was acting as trustee of his bankrupt estate at date of suit (R. 1).

6. By direction of the Court and its referee, petitioner, from time to time, made deposits in said depository, in his name as trustee for said bankrupt estate, of funds of the estate. When the bank closed its doors he had a balance on deposit of $3190.72 which has not been paid (R. 5).

7. Respondent filed an original and amended demurrer to the declaration, which appear at large on pages 7 and 8 of the record, but no ruling was ever made on their sufficiency.

8. A jury was waived and the cause submitted to the Court upon written stipulation of facts (R. 10).

The Stipulation.

It was stipulated that the bank was designated a depository; the bond executed and approved; petitioner was duly appointed, qualified and was still acting as trustee of the bankrupt estate; Flynn died at the time alleged and respondent was the executrix of his will; the bank closed its

doors owing petitioner, as trustee, the amount alleged, and of which amount a 10% divident, $319.07, had been paid and the remainder with its interest was still unpaid, all as alleged in the declaration.

Respondent desired to have certain other facts stipulated which petitioner believed to be immaterial and those were admitted to be true, if material and their materiality submitted to the Court:

(a) Flynn and Herring resided in Kingwood, W. Va., when the bond was given and until Flynn's death and Herring still resided there.

(b) Flynn was president, Herring vice president of the bank, and at Flynn's death Herring became the president and was such when it closed.

(c) Petitioner resided in Kingwood when Flynn died, but did not know of his death until June, 1931. He could have known of it by investigation. He did not know of Flynn's suretyship on the bond but could have known that by personal investigation.

(d) Respondent was employed in the bank for a time in each of the years 1918, 1919, 1926 and 1928, but never knew of Flynn's suretyship on the bond. (See Stipulation, R. 10 to 13, inc.)

The Judgment.

The Court entered judgment, September 21, 1935, for petitioner, against all defendants, jointly and severally, for $3680.25 with interest until paid (R. 9-10).

Respondent took a separate appeal (R. 14-15).

Jurisdiction.

Jurisdictional grounds are set out at length in the petition for certiorari in the case on pages 8 and 9.

(1) We rely upon the provisions of Section 347, subsection (a) of the Judicial Code giving authority to the Court to review by certiorari the action of circuit courts of appeals of the United States.

(2) Judgment in favor of petitioner was set aside and reversed by the United States Circuit Court of Appeals for the Fourth Circuit upon the ground that the death of Flynn automatically released his estate from liability as surety on the depository bond in question, for reasons assigned in the opinion (R. 22-26).

(3) The conclusions reached in that opinion are in substantial conflict with the judgment of the Circuit Court of Appeals for the Seventh Circuit in an analogous case, though the questions in the two cases are not identical.

Continental Casualty Co. v. *U. S.*, 68 F. (2d) 577.

(4) A Federal question of great importance was involved and decided, which question has never been passed upon by this Court.

(5) That applicable decisions of this Court in *Minturn* v. *U. S.*, 106 U. S. 437, and *Smith* v. *U. S.*, 8 L. Ed. 130, were not given proper effect by said Circuit Court of Appeals in this case.

Specification of Errors.

The Court erred:

(1) In reversing the judgment of the District Court in this case and in setting aside the judgment of petitioner.

(2) In deciding that the bond in question is analogous to a guaranty of a series of sales and not analogous to an official bond.

(3) In deciding that, by the execution and approval of said bond, the Kingwood National Bank did not become an

actual depository for funds arising from the estates in bankruptcy, but became such actual depository only if and when deposits of such funds were made therein.

(4) In deciding that the District Court must keep itself constantly advised of the solvency and continued life of sureties on such bonds.

(5) In its conclusion that if such duty exists, neglect of such duty by said court can prejudice the creditors of bankrupt estates by discharging the sureties on such bonds.

(6) In adjudging that Flynn's estate was released from liability on this bond.

Summary.

(1) The Circuit Court of Appeals assumes, contrary to reason and without justification by the record, that no funds of any bankrupt estate, except those in suit, were ever deposited in the depository.

(2) The bank became a depository, actual and not merely potential, upon execution and approval of the bond in suit, and petitioner was justified in depositing funds therein without personal investigation as to the sureties. Title 11, Section 101 and Section 75, subsection (3) of Title 11 U. S. C. A.

(3) The consideration for this bond was given all at one time. It was not the deposits that might be made in the bank in future, but the then giving to the bank a status authorizing it to receive such deposits.

(4) Even in private transactions the surety on a bond, the consideration for which is given all at one time, is not discharged by death. See cases cited on page 24 of Record.

(5) Principles and rules applicable to private transactions cannot be applied where public interest and public

policy are involved. A bond given under a statute is construed liberally to effectuate the statutory design. *Mitchell* v. *Bank*, 65 S. W. (2) 99.

Argument.

In the majority opinion it is said:

> "There is no evidence that any other bankruptcy funds were deposited in the bank before or after the death of the surety."

As such evidence would have been immaterial, irrelevant and inadmissible, of course there was no such evidence.

Whether the bank became an *actual* or merely a potential depository upon execution and approval of the bond, depends on what is meant by the term "Depository" in the statute. If it is limited to a bank having bankruptcy funds on deposit, the same bank may be a depository today, and without action by the Court, cease to be one tomorrow.

If a bank becomes a depository when authorized by law to receive deposits, then the Kingwood National Bank was a depository from date of the bond until it closed its doors.

It is said the bond was not a contract, but was a mere offer to contract until it was accepted by the making of deposits.

If an offer to contract, by whom could it be accepted?

Certainly a trustee in bankruptcy whose power was limited to depositing money received by him in a designated depository, could not so accept. "Title 11, Section 75, Subsection (3) U. S. C. A.

If acceptance was by the Court, then approval of the bond was acceptance of the offer.

Title 11, Section 101 of U. S. C. A., reads:

> "Courts of Bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the

residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories."

Section 78, Subsection (h), reads:

"Bonds of referees, trustees and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their condition."

The United States to whom the Court must "require bonds," has no title to or interest in the funds of any one bankrupt, but is interested in the funds of all bankrupts, for it would contravene all sound public policy for the United States through its laws and its courts in the enforcement of those laws to seize the property of bankrupts, prevent creditors from subjecting the same to their debts under state laws, and not jealously protect and preserve those funds for the creditors. No trustee can accept this bond, nor is he under obligations to go to the office of the Clerk of the Court of bankruptcy to investigate regarding the sureties thereon.

The majority opinion says (R. 24), "In our opinion the depository bond in the pending case is more nearly analogous to the guaranty of a series of sales or credits than to an official bond." We believe such bond is analogous to an official bond, and not analogous to any bond given for private purposes. Given to make the bank an officer or agent of the District Court, an arm of the government, it is in effect an official bond. Its obligee is not any trustee or a number of trustees in bankruptcy, but is the United States. Suit on such bond is in the name of the United States but for the benefit of the trustee.

Actually it is for the benefit of the creditors for whom the trustee preserves the assets.

Under state laws a constable executes a bond payable to the state. He handles no money belonging to the state, but collects money upon executions issued by the court and in other ways comes into possession of moneys belonging to various individuals. If he defaults in accounting therefor, suit is in the name of the state, but for the use of any individual injured.

A trustee in bankruptcy has no more authority to accept or reject what the circuit court has termed an offer to contract contained in the depository bond than any private individual has to accept or reject the bond of a constable or any other public official. Public policy relieves the trustee of that, and places the duty and responsibility of approval on the court.

It is not clear from the opinion just how important the Circuit Court of Appeals considers the fact to be that the respondent was ignorant of her decedent's suretyship on the bond. In the stipulation of facts her lack of knowledge was admitted, but its materiality challenged. We still deem it to be immaterial.

In the administration of estates of decedents the personal representative executes a bond, payable to the state. If a surety on such bond dies, though his personal representative may be ignorant of such suretyship, death does not terminate his suretyship, yet the hardship upon the representative is just as great upon such surety as in this case. That death does not end such suretyship is admitted in the majority opinion, and sustained by cases cited on page 24 of the record.

If a bank having been designated and having given bond as a depository does not become an actual depository until funds are deposited therein, retains its status as a depository so long as any funds are therein deposited and loses

such status when all such funds are withdrawn, then if it happened that in one bank a single trustee deposited funds, thereby accepting the suretyship of the bond, and because of litigation or other complications affecting the estate those funds would remain for many years deposited in said bank, and during that time a surety upon the bond would die, under the theory of the majority opinion in this case that bank would still be an actual depository, and the dead surety liable for all funds thereafter deposited by any trustee; while another bank, from which it might happen that all funds on deposit would be withdrawn, would cease to be a depository, and the death of a surety would terminate his suretyship and defeat the right of trustees thereafter depositing in that bank to recover on their bond.

It is held by

Fewless v. *Keesham*, 88 Fed. 573,

and other cases cited on page 24 of the record, "When the consideration for the promise is indivisible and entire and is given all at once" the death of a surety does not discharge his suretyship. We believe that in this case the consideration for the execution of this bond was given all at once; that the consideration was not that a certain trustee or trustees would in the future deposit money in the bank, but was that the bank should be authorized to receive any and all such deposits when offered.

There Is a Distinction in Reason Between Bonds Given for Public Purposes and Private Bonds.

We do not believe that the reasoning of the courts and the rules laid down as applicable to bonds for purely private purposes can be applied to such bonds as this. An examination of the cases cited on pages 24, 25 and 26 of the record will disclose that where it is held that the death of a surety with notice, and in some cases without

notice, terminated the suretyship, no public interests were involved, and in many cases the court speaks of the fact that the obligee in such bond could be by proper diligence fully protected himself. In those cases it was the obligee charged with the duty of protecting himself, and having opportunity to do so, who suffered by the release of the surety.

As we have said, in this case the obligee is the United States, but it is not the United States that suffers if the surety in such bond as this is discharged by death. The loss in such case must fall on persons who have no opportunity to protect themselves. When J. W. Flynn executed this bond to give to the bank of which he was president the status of a depository, he was bound to take notice of the responsibility which he assumed. No heir, distributee or personal representative can be charged with any loss because of his suretyship on this bond except loss of what might come to them from his estate. With full power to charge that estate as he did, and to dispose of it as he would, he executed this bond, binding upon himself, his heirs, executors, administrators, successors and assigns. So long as he lived he knew of his suretyship on this bond, and that in terms it bound his estate after his death. If then a loss is to be sustained by anyone by failure to take steps to end the liability on this bond, should that loss fall upon the estate, or upon the innocent creditors of a bankrupt estate?

The opinion stresses the fact that this bond was for an indefinite period. So was the bond in

Westervelt v. *Mohrenstechir*, 76 Fed. 118.

The Court in that case said the law relating to the subject matter of the bond must be construed as if part of the bond itself. It further held that the Court must put itself in the situation of the parties at the time they signed the

bond to determine their intention as to what would release a surety. In

Bauer v. *Highway Improvement District,* 270 S. W. 533,

it was held that the legislature had no authority to relieve the sureties on the depository bond when private individuals had a vested interest in the funds thereby secured.

A bond given in pursuance of the statute must be construed in the light of the statute, and interpreted liberally to effect the statutory design. That design in this case was to provide a place for the safe keeping and prompt paying over of funds of bankrupt assets.

Mitchell v. *Bank,* 65 S. W. (2nd) 99;
Andrew v. *Bank,* 219 N. W. 34;
Pickens County v. *Love,* 171 S. E. 799; Pt. 7;
Oakland County v. *Casualty Company,* 255 N. W. 229.

The liability of the surety on such bond continues as long as the bank retains the status given it by the bond.

Board of Commissioners v. *Bank,* 252 Pac. 475.

In the opinion (R. 28) the Court says it is the duty of the Court under Section 101, "from time to time as occasion may require, to increase the amount of any bond or change the depository." We do not so read that section. It says the Court "shall" designate depositories and take bonds, but that it "may" increase the amount of the bond or change depositories. Even if "may" were read as "shall," still no duty rests on the Court to increase amount of the bond or to change the depositories until some "occasion" therefor is called to his attention.

As is shown above, we respectfully disagree with the conclusion that the bond was only an offer to contract, and did not ripen into a contract until deposits were made; that the situation is like the continued guaranty of a series

of performances; that there was no present consideration for the bond (R. 24); that it constituted until accepted by a depositing trustee, a revocable offer (R. 25); that liability is to be determined by the question whether a reasonable time had elapsed after Flynn's death before deposits were made or that consideration can be given to what petitioner knew or could have known when the deposits were made (R. 27).

We believe that a rule vanishes when the reason for the rule is done away with, and that reason and justice demand that the liability on a bond of this character continue until a new bond is given, or the bank relieved of its status as a depository, so that funds of bankrupts will no longer be deposited therein.

We believe the statement "So far as we know, no trustee in bankruptcy had ever made a deposit in the bank under the protection of the sureties' promise" (R. 24-25), shows the Court was influenced by the statement in the demurrer to the declaration that the declaration showed no funds of said bankrupt or any other bankrupt were on deposit, and that no such deposits were made after Flynn's death for more than four years (R. 7). Such statements as to other bankrupts were wholly unfounded and unjustified. The declaration showed nothing of the kind, and it is preposterous in the absence of such showing to assume that in a community wherein so little bankruptcy existed as to make that possible the officers of a bank would seek designation of said bank as a depository and the president and vice president execute the bond in question.

We do not believe it is the duty of a district judge, with his district extending across the entire Northern part of the State of West Virginia, more than three hundred miles in breadth, and with five places in which to hold court to keep himself constantly informed of the solvency and con-

tinued life of each surety on such bond as that in suit. But assuming it was his duty, his default can not prejudice the rights of creditors of bankrupt estates.

Hoge v. *Brookover,* 28 W. Va. 210;
Smith v. *United States,* 8 L. Ed. 130;
Minturn v. *United States,* 27 L. Ed. 208;
Beckley v. *Wolford,* 104 W. Va. 391.

We respectfully contend that the opinion of Judge Parker (R. 29-31), is the better reasoned opinion, more consonant with the law and equities of this case, and we hereby adopt the same as part of this brief.

We believe that the judgment of the Circuit Court of Appeals should be reversed, and that of the District Court affirmed.

Respectfully submitted,

F. E. Parrack,
Attorney for Petitioners.

(8479-C)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 335

UNITED STATES OF AMERICA,
for the use of Charles P. Wilhelm, Trustee of the Estate of W. H. Pentony, Bankrupt,
Petitioner,

vs.

NELLIE FLYNN CHAIN,
Executrix of the Last Will and Testament of James W. Flynn, Deceased,
Respondent.

BRIEF FOR RESPONDENT OPPOSING THE PETITION AND THE ISSUING OF THE WRIT OF CERTIORARI.

P. J. CROGAN,
FRANK COX,
Counsel for Respondent

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BRIEF FOR RESPONDENT OPPOSING THE PETITION AND THE ISSUING OF THE WRIT OF CERTIORARI.

STATEMENT

The statement of the matters involved, found on pages two, three and four of the Petitioners petition herein seems to be correct as therein stated.

QUESTION INVOLVED

The only real question involved is this:

The Kingwood National Bank was designated a depository for the funds of bankrupt's estate and as such depository it executed a bond with George A. Herring, and James W. Flynn, sureties.

The bond was executed in 1924. Flynn died in 1926, and there were no funds deposited by the trustee up to that time in the bank.

There were no funds deposited in the bank by the trustee until some time in 1930, four and one-half years after the death of Flynn. The personal representative of the estate of Flynn knew nothing about his being on such bond and her attention was never called to the fact that deposits were being made in the bank after his death, and she had no notice of the bank being a depository with her father as surety, or no notice that deposits were being so made after his death until the bank closed in 1931.

The trustee in bankruptcy, Petitioner herein, lived in the same small town in which Flynn and Herring lived. Flynn was President of the bank at the time he died and Herring was a director. Upon Flynn's death Herring was elected President and so remained up until the closing of the bank in 1931.

The sole question is,—should Flynn's estate be held liable for those deposits which, for the first time, were made nearly five years after his death?

The Circuit Court of Appeals, Fourth Circuit, held that his estate should not be held liable under the circumstances. Fed. Vol.—84 (2nd)—138.

It is claimed that it would be a hardship on Herring to require him to pay this entire indebtedness. It is always a hardship for a surety to have to respond and pay out money for his principal default. If there was any one person in the whole transaction who could have pro-

tected himself and protected Flynn's estate that person was Herring. He was a director in the bank, knew of the bond which he and Flynn signed, and he remained a director for nearly five years before any deposits were made, and he knew at that period, five years, that no deposits were made until at that time. He could have prevented that by appealing to the referee or to the court to have a new bond given in the place of the one on which Flynn was surety in his lifetime, or he could have his bank refuse to accept any funds. If he had done this he would not be liable for more than one-half of it because the new surety would be liable for the other one-half, and no one would suffer more than was intended by the law. Just why Herring permitted matters to run along like this is not clear. There is no suggestion or averment that Herring is financially unable to pay this bond. Judgment has been entered against him by the District Court of the United States for the Northern District of West Virginia, for this entire amount, and so far as the record shows he has not paid any part of it,—and now Flynn's estate is being pursued by the Trustee, for some reason not disclosed, instead of the Trustee proceeding to collect the money against the man who has judgment rendered against him.

It looks to us as if this suit ought to be dismissed for the reason that the Trustee is pursuing the dead man's estate at the expense of the bankrupt's estate and creditors because all the costs and all of the necessarily large lawyers fees is coming out of the bankrupt's estate, and regardless of how this court decides, the bankrupt's estate will not profit. It is only a question of whether the dead man's estate shall pay one-half the debt and Herring pay the remainder, or whether Herring shall pay it all.

The case of Continental Casualty Company against the United States, 68 F. (2nd) 577, is not in point. In that case the surety had not died, but he sought ineffectively

to be released from the bond and he was refused. That is not this case. So that there is in fact no conflict between the decision of the Circuit Court of Appeals, Fourth Circuit, in this case and that of Continental Casualty Company against the United States, supra.

No Circuit Court of Appeals, so far as we have been able to discover, has decided this question except the Fourth Circuit, which decided it in the case at bar.

EFFECT OF DEATH OF SURETY

We admit:

(a) That the death of a surety on an official bond does not release his estate as to the funds in the hands of a principal at the time of his death.

(b) That the death of a surety does not release his estate where the bond for which he is surety is for costs for a pending or proposed suit even if those costs, or part of them, were incurred after the death of a surety.

(c) That the death of a surety does not release the estate where the bond is given by a fiduciary and though the breach of the bond was committed after the death of the surety.

In each of these cases the amount for which the principal will be liable, or the exact relationship of the principal to his surety is well known and the bondsman knows he is held for a debt liability, namely,—the costs of suit not yet incurred, or the amount of a single estate, whatever sum that might be.

It is different in cases like the one under consideration. When Flynn signed the bond there were no funds of that kind in the Bank. When he died there were no funds of that kind in the Bank, and for nearly five years after his death there were no funds of that kind placed in the Bank. His contract when he signed the bond did not render him liable for any money unless money were placed in the Bank; and money was placed in the Bank

nearly five years after his death, at a time when he could not contract, nor was it in contemplation that he would be held liable for what might be called a contractural relation between him and the bank after his death,— no such contract could be made.

As is stated in First Brandt on Suretyship, Sec. 152, citing Valentine vs. Kelley Bank, 133 Cal. 191,—

"A dead guarantor can make no promise."

To hold Flynn's estate liable for funds deposited four and one-half years after his death, and without the knowledge of his personal representative that such funds were so being deposited would, in our opinion, be a monsterous proposition and a travesty on justice.

SURETIES ARE FAVORED BY THE LAW

It is a rule of courts that sureties are favored by law; that the rule of *strictissimus juris* is applicable. The surety cannot be held liable, nor his liability extended beyond the strict terms of his engagement, nor by implication. They are not to be held liable beyond the strict letter of their obligation.

Cases holding that sureties are favored by the law are: —

21 R. C. L., page 1018, Sec. 66.
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And it is stated that when the consideration passes at different times (as in this case) the deposits being made from time to time, the liability of the surety terminates by his death,—

23 C. J. 290-291
16 R. I. 148 National Eagle Bank.

There was no way in which the executrix could protect the estate as she had no knowledge whatever that her father was surety on the bond, and she knew nothing of the deposits being made by the Trustee until after the Bank closed. She lived, you might say, side by side in a small town with Herring the co-surety and with Wilhelm the Trustee, and yet she was kept in the dark all those years, and only knew the circumstances when the Bank failed and closed its doors in 1931, her father the co-surety having died in 1926.

The petitioner on page 15 of his brief in support of his petition among other things says:

> "It was the duty of any surety trying to be released or desiring to be released to take active steps to that end."

It would be interesting to know how petitioner's counsel claims that the surety, Flynn, should have taken active steps to be released unless they can ask him to get out of his grave and do so. He had no opportunity and no desire to be released while he was living. He could not speak after he died.

As stated before; the case of Continental Casualty Company against United States, 68 F. (2d) 577, and the case of United States against Robson, 28 American Bankruptcy Reports, 45, are not in point. In neither of these cases was the question of the death of a surety involved, and the same is true in the case of Smith vs. United States, 8 L. Ed. 130, cited by counsel for petitioner.

We are dealing with this case at bar as the facts present themselves and not with an imaginary case of a deposit made ten minutes after the death of a surety.

We most respectfully submit that the opinion of the majority of the members of Circuit Court of Appeals, Fourth Circuit, in this case is conclusive and beyond question a proper decision under the facts and circum-

stances in this case, and that the question is so clear, so fair and according to justice and right that the prayer of the petitioner should be refused.

P. J. CROGAN
KINGWOOD, W. VA.
FRANK COX
MORGANTOWN, W. VA.
Counsel for Respondent

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BRIEF FOR RESPONDENT

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We are dealing with this case at bar as the facts present themselves and not with an imaginary case where the facts and circumstances may be entirely different.

It has been held that significant differences are to be found between depository bonds and the ordinary continuing guaranties or on official bonds; and that the continuing guaranties, where no present consideration is given in exchange is a continuing offer of a promise to stand security for advances made to the principal, and this promise does not become a binding contract until accepted by the act of the obligee in advancing credit on the strength of the guaranty; those offers which have not been previously accepted are terminated by the death of the offeror, and furthermore that the orthodox view is that death of itself ends the relationship.

Restatement Contracts 1932, Sec. 44-48.
2nd Williston Contracts, 1920.
Aitken vs. Lang's Adm'r. 106 Ky. 52.
Jordon vs. Dobbin, 122 Mass. 168.
American Chain Co. vs. Arro Grip Mfg. Co., 235 N. Y. Supp.
In re. Kelley's Estate, 173 Mich. 492.
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We most respectfully submit that the opinion of the majority of the members of Circuit Court of Appeals, Fourth Circuit, in this case is conclusive and beyond question a proper decision under the facts and circumstances in this case, and that the question is so clear, so fair and according to justice and right that the decision of the lower court should be affirmed.

P. J. Crogan
KINGWOOD, W. VA.
Frank Cox
MORGANTOWN, W. VA.
Counsel for Respondent

SUPREME COURT OF THE UNITED STATES.

No. 335.—October Term, 1936.

United States of America, which Sues for the Use and Benefit of Charles P. Wilhelm, Trustee, etc., et al., Petitioners, *vs.* Nellie Flynn Chain, Executrix of the Last Will and Testament of James W. Flynn, Deceased.	Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[February 1, 1937.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action on the bond of a designated depository for money of bankrupt estates. The case will be stated.

July 22, 1924, a national bank at Kingwood, West Virginia, was designated by the bankruptcy court of that district as a depository for funds of bankrupt estates, subject to the requirement that the bank give a bond in the penal sum of $5,000 and that the bond have the court's approval. Later in the same month the bond was given by the bank and approved by the court. Thereupon the bank became an authorized depository, and it continued to be such, without giving any further bond, until June 22, 1931, when it failed.

The bond was under seal; named the United States as obligee; was signed by the bank and two individual sureties, as obligors; declared that the obligors were thereby binding themselves, their heirs, executors, administrators, and successors, jointly and severally; recited the designation of the bank as a depository; and was conditioned for the faithful discharge and performance by the bank of all duties pertaining to it as a depository.

Between August 12, 1930, and June 22, 1931, Charles P. Wilhelm, as trustee for the estate of W. H. Pentony, a bankrupt, deposited in the bank, as a designated depository, various sums of money belonging to that estate, and made authorized withdrawals, with the result that, of the deposits so made, there remained in the

bank on June 22, 1931, a balance of $3,190.72 to the credit of the trustee. On that day the bank became insolvent, closed its doors, refused to pay to the trustee the balance so owing to the bankrupt estate, and thereby broke the condition of its bond.

In March, 1926, which was after the bond was given and approved and before Wilhelm, trustee, made any deposit in the bank, James W. Flynn, one of the sureties on the bond, died and Nellie Flynn Chain became executrix of his estate. Flynn did not at any time during his life seek to revoke or terminate his suretyship; nor did his executrix subsequently take any step to that end.

The action on the bond was in the name of the United States for the use of Wilhelm, trustee, and was brought against the bank, the surviving surety and the executrix of the deceased surety.

The district court gave judgment against the defendants for the balance due Wilhelm, trustee. The executrix of the deceased surety appealed, and the court of appeals reversed the judgment as to the estate of that surety. 84 F. (2d) 138. Certiorari was granted by this Court.

Pertinent statutes and a related general bankruptcy order are copied in the margin.[1]

The crucial question for decision, as was said by the court of appeals, is whether the obligation of an individual surety on such a depository bond terminates with his death. That court answered in the affirmative, one judge dissenting. It likened such a bond to a continuing guaranty whereby the guarantor, without present consideration, guarantees a series of future performances, such as

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[1] Bankruptcy Act of 1898.

Sec. 47 (a) Trustees shall respectively . . . (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on such depositories in which it has been deposited; . . .

Sec. 50 (h) Bonds of . . . designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

Sec. 61 (a) Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

General Order XXIX. No moneys deposited as required by the Act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge . . .

payment of the purchase price of goods to be sold, or repayment of money to be advanced, from time to time in the future; and it applied the usual rule that such a guaranty is merely an offer and does not ripen into a contract in respect of any sale or advance until the same is made, and that the guaranty, in so far as it remains merely an offer, may be revoked by the guarantor and is terminated by his death.[2]

The court rightly recognized that a continuing guaranty, if supported at the outset by a sufficient consideration, is a binding contract which is neither revocable by the guarantor nor terminable by his death, although the acts guaranteed may cover a long or indefinite period of time.[3] But it pronounced this rule inapplicable because it regarded the bond as more nearly analogous to a continuing guaranty without present consideration.

We are of opinion that the bond was not a mere offer but was given upon a present and sufficient consideration, and therefore became a binding contract when it was delivered to and approved by the bankruptcy court. The inducement, as also the occasion, for the bond was the designation of the bank as a depository. This was a present, adequate and indivisible consideration.[4] Without the bond the bank would not have been entitled to the advantages of the designation; while with the bond it was entitled to them. In this regard the bond was like that of a collector of customs, county treasurer, sheriff, clerk of court, administrator, guardian or cashier, as to which it is well settled that the selection of the officer or employe whose fidelity is assured constitutes a present consideration amply supporting the undertaking of the obligors—sureties as well as principals.[5]

"It is a presumption of law that the parties to a contract bind not only themselves but their personal representatives. Executors,

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[2] Davis Sewing Machine Co. *v.* Richards, 115 U. S. 524, 527; Jordan *v.* Dobbins, 122 Mass. 168; Rest. Contracts, §§ 35 (e), (f), 44, 48.

[3] Davis *v.* Wells, 104 U. S. 159, 165-167; Zimetbaum *v.* Berenson, 267 Mass. 250, 254; National Eagle Bank *v.* Hunt, 16 R. I. 148, 151; Kernochan *v.* Murray, 111 N. Y. 306, 308-309; Bennett *v.* Checotah State Bank, 176 Okla. 518; Williston Contracts, Rev. Ed. § 1253; Rest. Contracts, § 46; 1 Brandt Suretyship and Guaranty, 2d ed., § 133.

[4] Lloyd's *v.* Harper, L. R. 16 Ch. Div. 290, 314, 317, 319; In re Crace, L. R. 1902 (1) Ch. Div. 733, 738; Williston Contracts, Rev. Ed. § 1253.

[5] Estate of Rapp *v.* Phoenix Insurance Co., 113 Ill. 390, 395; Lloyd's *v.* Harper, L. R. 16 Ch. Div. 290, 314, 317, 319; In re Crace, L. R. 1902 (1) Ch. Div. 733, 738; Williston Contracts, Rev. Ed., § 1253.

therefore, are held to be liable on all contracts of the testator which are broken in his lifetime, and, with the exception of contracts in which personal skill or taste is required, on all contracts broken after his death."[6]

The bond in suit is a contract for the conditional payment of money, not the exercise of personal skill or taste, and therefore is one to which the presumption applies. No doubt it is admissible to restrict the presumption by a stipulation limiting a surety's obligation to defaults occurring within his lifetime, but the present bond does not contain such a stipulation, or anything indicating that such a limitation was intended. On the contrary, its terms are in full accord with the presumption, for in it the obligors expressly declare their purpose to bind not only themselves, but also their executors, administrators and successors, jointly and severally, for the performance of the obligation set forth.

In a long line of decisions relating to bonds not distinguishable from the one in suit it has been held that a surety's obligation does not terminate with his death but binds his personal representatives for past and subsequent defaults, as it would bind him if living.[7] The principle underlying these decisions is the same that prevails in respect of other related contracts, and we regard it as well sustained in reason and supported by the preponderant weight of authority.

Cases are brought to our attention in which it is held that a surety may terminate his obligation as respects future defaults by giving notice to that effect to the obligee. But these cases are not apposite. In some the instrument sued upon was held to be only a continuing offer without a supporting consideration and therefore revocable as to future transactions. Others rest upon a power so to terminate expressly reserved in the bond or in the applicable statute. Here the bond is a binding contract supported by an adequate consideration, and there is no reservation of a right to terminate

[6] 1 Chitty Contracts, 11th Am. Ed., 138; 2 Parsons Contracts, 6th ed., 530-531.

[7] Broome *v.* United States, 15 How. 143; Hecht *v.* Weaver, 34 Fed. 111; United States *v.* Keiver, 56 Fed. 422, 423; Fewlass *v.* Keeshan, 88 Fed. 573, 574; Pond *v.* United States, 111 Fed. 989, 997; In re Crace, L. R. 1902 (1). Ch. Div. 733; Calvert *v.* Gordon, 3 Man. & Ry. 124; Green *v.* Young, 8 Greenl. 14; Royal Insurance Co. *v.* Davies, 40 Iowa 469; Moore *v.* Wallis, 18 Ala. 458; Knotts *v.* Butler, 10 Rich. 143; Hecht *v.* Skagg, 53 Ark. 291; Shackamaxon *v.* Yard, 150 Pa. 351, 358; Mundorff *v.* Wangler, 44 N. Y. Sup. Ct. 495, 506; Voris *v.* State, 47 Ind. 345, 349-350; Exchange Bank *v.* Barnes, 7 Ontario 309, 320; Snyder *v.* State, 5 Wyo. 318, 323.

in the bond or in the statute under which it was given. Nor has there been any effort to effect such a termination.

Whether the bankruptcy court may, upon appropriate application and showing, discharge a surety on an existing bond, as respects possible future defaults, and require the depository to give another and substituted bond, need not be considered, for no such application or showing appears to have been attempted.

While the bond was under seal we need not consider the effect to be given to this under the local law, for it affirmatively appears that the bond was given for a present and adequate consideration, which leads to the same result as if the seal were given the effect which would be accorded to it at common law.

It results that the judgment of the court of appeals must be reversed and that of the district court affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.